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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	
Implementation of Sections of	)	MM. Dkt. No. 92-266
the Cable Television Consumer	)	
Protection and Competition	)	
Act of 1992: Rate Regulation	)	

OPPOSITION OF COX COMMUNICATIONS, INC., INTERMEDIA PARTNERS, L.P. AND JONES INTERCABLE, INC. TO PETITIONS FOR RECONSIDERATION

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SUMMARY

Cox Communications Inc., InterMedia Partners, L.P., and Jones Intercable, Inc. hereby oppose the Petitions for Reconsideration of the *Thirteenth Order on Reconsideration* filed by (1) the City of New York and the National Association of Telecommunications Officers and Advisors ("NATOA") and (2) the Georgia Municipal Association ("GMA").

NATOA's Petition takes issue with almost all of the procedural rules adopted by the Commission in its *Order* — and its points are uniformly lacking in merit. For example, NATOA suggests that the Commission should require cable operators that elect the annual adjustment methodology to make annual filings even in years when they do not intend to increase rates. Such a requirement would increase the administrative burdens on cable operators, franchising authorities and the Commission for no apparent reason other than to prevent "rate shock" to subscribers. NATOA apparently believes that subscribers would rather pay sooner than later, even though they are entitled by the rules to keep any interest that may accrue on deferred rate increases. Subscribers are not likely to share NATOA's view.

NATOA also suggests that the Commission not permit cable operators to switch back to the quarterly adjustment method once they have elected the annual method. Some cable operators that elect the annual method may find that projecting annual costs is substantially more burdensome than reviewing rates on a quarterly basis. There is no reason to force such operators to continue to use the more burdensome approach.

NATOA also challenges the Commission's rules regarding franchising authority review of annual rate filings. NATOA takes issue with the 15-day response deadline for status inquiries from cable operators, though such a requirement is a very simple yet

essential way to let cable operators know whether their rate increases are still subject to being rescinded. NATOA also suggests that the Commission eliminate the one-year limit on franchising authority review of annual filings because the Commission has yet to resolve outstanding rate cases. However, the status of outstanding rate cases is irrelevant to the local rate review process because, to the extent local rate orders are upheld or reversed, the Commission's rules would permit operators to offset or augment rates prospectively to compensate subscribers for overcharges or recoup past undercharges.

NATOA raises several other issues which do not warrant reconsideration of the Commission's *Order*. NATOA suggests that the Commission should compel operators to issue *refunds* whenever projected costs exceed actual costs, rather than requiring that they offset future rates by any overcharges. The current rules, however, fully compensate subscribers for all overcharges plus applicable interest — so that nothing is gained by imposing the additional costs and burdens of refunds. NATOA also asserts that franchising authorities not be required to pay 11.25% interest on franchise fee overpayments, although the Commission specifically held that the cost of capital for cable operators is presumptively 11.25%.

GMA's Petition raises one discrete issue: the Commission should afford interest parties the opportunity to file complaints concerning cable programming service rates that were in effect prior to May 15, 1994 but which have not been adjusted as of that date, and which GMA assumes may exceed presumptively reasonable rates under the Commission's new benchmark rules. There are two problems with this proposal. First, there is a statutory bar on rate complaints after the first 180 days of rate regulation. Thus, the Commission cannot modify its rules to permit parties to file rate complaints on initial rates. Second, as a practical matter, any rate reductions that subscribers would have realized with the onset of the new benchmark rate rules would be offset almost entirely by the inflation that cable operators could have taken from the initial date of regulation through June, 1995. The remainder of any difference between current rates and benchmark rates would likely be covered by foregone external and non-external cost adjustments.

The Commission should therefore reject the petitions for reconsideration filed by NATOA and GMA and affirm its *Order*.

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OPPOSITION OF COX COMMUNICATIONS, INC., INTERMEDIA PARTNERS, L.P. AND JONES INTERCABLE, INC. TO PETITIONS FOR RECONSIDERATION

Cox Communications, Inc., Intermedia Partners, L.P. and Jones Intercable, Inc. (the "Parties"), by their attorneys and pursuant to Section 1.429(f) of the Commission's rules, 47 C.F.R. § 1.429(f), hereby oppose the Petitions for Reconsideration of the Commission's *Thirteenth Order on Reconsideration*[1/] filed by the City of New York and the National Association of Telecommunications Officers and Advisors ("NATOA") and the Georgia Municipal Association ("GMA").[2/]

1/ Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, *Thirteenth Order on Reconsideration*, MM Dkt. No. 92-266, FCC 95-397 (rel. Sept. 22, 1995) ("*Thirteenth Recon. Order*").

2/ Notice of the Petitions for Reconsideration was placed on public notice in the Federal Register, 60 Fed. Reg. 58087 (rel. Nov. 24, 1995).

INTRODUCTION

In the *Thirteenth Recon. Order*, the Commission adopted two modifications to its rules that fundamentally improve the process of cable rate regulation for cable operators, franchising authorities, the Commission, and subscribers without significantly affecting the rates subscribers pay for cable service. First, the Commission adopted a new alternative methodology for increasing rates to account for inflation and increases in "external costs." Previously, such rate increases generally could not be implemented until after they were incurred. Annual inflation increases were based on the previous year's change in the Gross National Product Price Index ("GNP-PI") and could not be implemented until after that year's GNP-PI figures were available. Increases in external costs (programming, taxes and franchise-related costs) could be implemented on a quarterly basis, to reflect increases incurred in the previous quarter.

This approach created a regulatory lag that prevented cable operators from recovering their costs on a timely basis. Moreover, it forced operators, in order to minimize the regulatory lag, to implement rate increases as frequently as four times a year and required franchising authorities to bear the administrative burdens of reviewing these multiple requests. Each such rate increase imposed additional administrative costs on operators in billing and notifying subscribers of rate changes while irritating and confusing subscribers. The new alternative approach alleviates these problems by allowing operators who agree to increase rates no more frequently than once a year to base their increases on *projected* inflation and external costs in the upcoming year. In the end, consumers pay no more or less than the *actual* inflation and external cost increases incurred; operators are required to adjust their next rate increase to reflect (with interest) any overcharge resulting from the difference in projected and actual costs during the previous period, and may adjust rates to recover any undercharge; and franchising authorities are relieved of the costs of reviewing multiple rate increase requests.

Second, the Commission modified its rules so that all that is put "in play" by a complaint against a rate increase is the increase itself — and not the previous rate. Previously, the Commission, in considering complaints against a rate increase, determined that it could rescind the increase and also prescribe a rate lower than the previously existing rate -- even if no complaint had been filed against the previously existing rate within the time period authorized by the rules. This approach created financial uncertainty and instability for cable operators, undermining efforts to invest in programming and facilities. The new rules appropriately recognize that there is no point to imposing such uncertainty and instability where subscribers and franchising authorities have not complained against pre-existing rates.

The changes in the rules reduce the costs to operators and franchising authorities, and the uncertainty and regulatory lag imposed by the Commission's procedures without affecting the standards or benchmarks for assessing the reasonableness of rates. NATOA and GMA's proposals would undo this progress, reimposing procedural costs and burdens on cable operators that have no commensurate benefits to consumers or franchising authorities.

I. Requiring Cable Operators To File for Rate Increases No *Less* Frequently than Once a Year Is Pointless.

Under the Commission's new alternative approach, cable operators may base their rate increases on projected costs instead of past costs if they agree to increase rates no more frequently than once a year. NATOA would add a provision that also effectively requires operators who choose the annual approach to implement rate increases no *less* frequently than once a year. Its proposal would require operators to file Form 1240 annually, and, while "[a] cable operator, of course, would not be required to raise its rates to the maximum permitted level as a result of such filing," an operator that failed to implement an annual increase would lose forever the right to recoup any amount by which its actual costs exceeded its projected costs in the preceding year. The current rules include no such "use-or-lose" provision. Where an operator *over*estimates its costs, it is required to implement an appropriate adjustment within a year of implementing its prior rate increase. But an operator that underestimates its costs may wait as long as it chooses before recouping the shortfall — although interest ceases to accrue after the first year.

It is hard to imagine how anyone — especially cable subscribers — would be better off under NATOA's proposal. NATOA asserts that "cable subscribers may experience 'rate shock' if a cable operator tries to recoup years of undercharges with its next FCC Form 1240 filing."[3/] There are, however, countervailing tangible benefits to consumers that may offset any supposed emotional trauma associated with such "rate shock." Put simply, the money at issue remains in their bank accounts rather than in the cable operators' — and, as noted above, the subscribers get to keep the interest that accrues on such funds. Moreover, an operator can avoid rate shock by spreading out over a period of time what it believes would otherwise be too high a rate increase. In any event, it is unlikely that subscribers will ever experience substantial one-time rate increases as cable operators face increasing competition from DBS, wireless and video dialtone services.

3/ NATOA Petition at 5.

NATOA also contends that "to the extent an operator seeks to 'true-up' undercharges during a previous adjustment period, the FCC rules permit an operator to recoup such undercharges only during the next annual adjustment *year*."[4] Requiring annual filings of Form 1240 will therefore be useful in ensuring "that an operator does not continue to recoup such 'true-up' after the 12-month recovery period . . . ."[5] The principal problem with this argument is that the rules do *not* limit the recovery of undercharges to the next annual adjustment year. To the contrary, "[a]n operator may recover accrued costs between the date such costs are incurred and the date the operator actually implements its rate adjustment."[6] The Commission's amended rules eliminate any "use or lose" requirement and they were intended to do so because it is unfair to require operators to "use" or "lose" the rate adjustment;[7] operators are entitled to recover their costs regardless of when they choose to increase rates. NATOA's proposal would only make it more likely that costs are recovered, in the form of rate increases, sooner rather than later.[8]

4/ *Id.* (emphasis added).

5/ *Id.* at 5-6.

6/ 47 C.F.R. § 76.922(e)(3)(iii).

7/ *See Thirteenth Recon. Order* at ¶ 62 ("On our own motion, we are also eliminating the 'use or lose' mechanism for inflation increases in external costs and increases in the number of channels for operators that elect the annual adjustment methods." (citations omitted))

8/ As noted above, a cable operator whose actual costs in the year following a rate increase are *lower* than it had projected must file a Form 1240 and adjust its rates to account for the overcharges at the end of the year, whether or not it chooses to implement another increase. Moreover, rates must be adjusted annually "to reflect any net decreases in external costs that have not previously been accounted for in the system's rates." 47 C.F.R. § 76.922(e)(2)(ii)(B). NATOA suggests that, absent an additional general requirement that all operators file annually, those operators who do not intend to seek an annual increase "will

(continued...)

Finally, NATOA contends that requiring cable operators to file for annual rate increases or to file Form 1240 more frequently than they would have chosen to do will somehow *reduce* the administrative burdens imposed on franchising authorities. By reviewing data on a yearly basis "when it is still fresh and verifiable,"[9/] franchising authorities and the Commission could, according to NATOA, avoid the "administrative nightmare"[10/] of "trying to review years of data and to retroactively reconstruct the data."[11/] This is patent nonsense. Cable operators' records do not become stale over time, nor do they require "reconstruction" by regulators. Operators maintain their records for accounting purposes, among other reasons, for several years, and they are required to demonstrate and attest to the validity of the cost information that they provide. Requiring operators to make rate filings each year whether or not they would otherwise have chosen to increase rates — and requiring regulators to review such filings — quite obviously would *increase* administrative burdens on franchising authorities, on the Commission, and on cable operators. And these increased burdens would produce no corresponding benefits.

8/ (...continued)
not be inclined to complete the Form 1240 to determine whether there is a net increase or decrease in external costs." NATOA Petition at 6 n.5. There is no basis to assume a "disinclination" on the part of cable operators to comply with an unambiguous regulatory obligation — nor is there any evidence to suggest that operators have failed to comply with this particular obligation in the two years since the initial rate regulation rules became effective.

9/ NATOA Petition at 6.

10/ *Id.* at 7.

11/ *Id.* at 6.

II. There Is No Reason To Prohibit Operators from Switching Back to the Quarterly Approach.

NATOA argues that, "to reduce subscriber confusion," cable operators that elect the annual rate adjustment option should not be permitted to switch back to the quarterly method. Quarterly rate changes can, indeed, sometimes be more disruptive and confusing — to cable operators *and* subscribers — than annual adjustments. For precisely this reason, the Commission's decision to permit an annual rate adjustment option constitutes a substantial improvement of the rules. But there may be circumstances in which the requirements of the annual approach — estimating prospective costs, "truing up" estimated and actual costs, and adjusting rates to account for any overcharges or undercharges — may prove more burdensome and confusing than the quarterly approach, which is based on readily measurable past costs. In those circumstances, there is no reason not to allow operators to return to the quarterly approach, subject to the procedural safeguards that the Commission has imposed on such switches.[12]

12/ *See Thirteenth Recon. Order* at ¶ 66; 47 C.F.R. § 76.922(c)(3). NATOA argues that prohibiting operators to switch back to the quarterly adjustment method would be consistent with the Commission's rule prohibiting cable operators from switching between the two alternative "going forward" methodologies for adding channels to regulated tiers. *Id* at 8 & n.7. The logic behind that prohibition, however, is not applicable here. The Commission adopted that rule to prevent operators from "gaming" the system to maximize permissible rates by, for example, choosing the old methodology, which allows a 7.5% mark-up on programming costs, only for high-cost channels while choosing the new methodology, which allows a fixed mark-up of 20 cents per channel, for no- or low- cost channels. *See Sixth Order on Reconsideration*, 10 FCC Rcd 1226, 1248-49 (1995).

III. The Commission Should Retain the Requirement that Franchising Authorities Respond to Status Inquiries Within 15 Days.

The Commission's rules require cable operators to submit Form 1240 notifications of annual rate increases at least 90 days prior to the effective date of the proposed increase. If a franchising authority has not ruled on the request within 90 days, the rate may go into effect, subject to a subsequent determination by the franchising authority rejecting the increase. So that cable operators will not be left wondering whether a franchising authority will issue an order denying the rate increase after this 90-day period, the Commission has required franchising authorities to respond within 15 days to inquiries from cable operators as to whether they intend ultimately to issue a rate order.

This is as simple and straightforward an obligation as appears anywhere in the Commission's rules. All that a franchising authority must do within 15 days is provide a one-word reply — yes or no — to a matter that it already has had more than 90 days to consider. It does not have to issue a rate order within 15 days; it need only indicate whether it *ever intends* to issue such an order.

To NATOA, however, this is a "draconian" requirement that would produce "unconscionable" results if the franchising authority cannot come up with an answer within such an "unreasonable time period." What happens, they wonder, if the inquiry is submitted "when the official responsible for responding is on vacation, or during the summer months when many city councils and county commissions may not even be in session"?[13/] And how will the parties deal with inevitable "disputes between a franchising authority and a cable

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13/ NATOA Petition at 9.

operator as to whether the franchising authority ever received an 'inquiry' from the operator"?[14/]

If a franchising authority can be entrusted with the task of applying the Commission's comprehensive rules, standards, and formulas to determine whether a proposed rate is permissible, surely it can be expected to provide some means for recognizing and responding within 15 days to an operator's simple status request, summer vacations and recesses notwithstanding — or it should cede regulatory jurisdiction to the Commission. NATOA offers, as a counter-proposal, a rule "that presumes that a franchising authority *will* issue a rate decision after the 90-day period, *unless* the franchising authority at the end of such period indicates that it will not issue a rate order."[15/] But this proposal misses the point of the Commission's rule. Because ignoring or failing to act on a rate request has the same effect as affirmatively approving the request, some franchising authorities may choose simply to approve rates by default. But operators have no idea whether this is the case or whether, in fact, the rate increase is still in play. The Commission's rule brings closure to those cases in which a franchising authority has no intention of acting — but NATOA's proposal would not. Under that proposal, continued silence on the part of a franchising authority would mean continued uncertainty as to whether a rate request has been tacitly approved or is still in play.

14/ *Id.*

15/ *Id.* at 10 (emphasis in original).

The Commission's rule provides operators with at least a modicum of certainty in certain circumstances, and it imposes only the slightest of burdens on franchising authorities in order to do so. The rule should be retained.

IV. Where Actual Costs Exceed Projected Costs, Offsets Against Future Rate Increases Fully Compensate Subscribers for Any Overcharges.

The Commission's rules provide that where a cable operator overestimates its costs in calculating an annual rate adjustment, its future rates must be reduced, no later than 12 months after implementing the rate adjustment, "to reflect the accrued amount of the overcharge plus 11.25% interest."[16/] This means either that existing rates must be lowered or that a subsequent annual adjustment must be offset by the amount of the previous overcharge plus interest.

NATOA contends that the Commission should, instead, compel operators to issue refunds for any overcharges. It asserts that requiring rate reductions and offsets will give operators incentives to overestimate their costs every year, thereby "overcharg[ing] subscribers in perpetuity."[17/] There is, however, no reason why this should be the case. Because the rules require offsets in the amount of any overcharges plus interest (and allow recovery of any undercharges plus interest), operators have no incentive to overestimate their costs. Whether subscribers are returned the overcharge in a single lump sum payment or in an amortized reduction of their rate, they will be made whole.

16/ 47 C.F.R. § 76.922(e)(3)(ii).

17/ NATOA Petition at 11.

NATOA also asserts that in subsequent years, "the operator also would have an incentive to overestimate its projected costs to take into account overcharges from the previous year [so that] cable subscribers would be in a position of always overpaying for cable service without ever recouping the amount of any overcharge."[18/] Any incentive that NATOA believes cable operators might have to perpetually overestimate their costs by including, each year, the ever-increasing amount of their previous year's overcharges plus interest would presumably exist regardless of whether they were required to return the overcharges in the form of lump sum payments or rate offsets. In other words, requiring refunds rather than offsets would not eliminate any such incentive.

The current rules, however, protect subscribers against incentives to overestimate costs by subjecting operators' cost projections to prior review by franchising authorities and to review upon complaint by the Commission. If the projections upon which a rate increase are based do not themselves appear to have a *bona fide* basis, the increase (with respect to basic rates) may be rejected and refunds may be ordered. There is no reason to suspect that any systematic overestimation of costs contemplated by NATOA would go undetected by franchising authorities and the Commission.

NATOA also contends that the Commission should eliminate its rule limiting refunds on basic rates to a one-year period because the one-year limit "simply does not work in the context of an annual rate review process of costs projected a year or more ago."[19/] This argument, however, confuses *refunds* that result from rate increases that exceed the

18/ *Id.*

19/ NATOA Petition at 12.

Commission's price cap rules with prospective rate *reductions* and *offsets* that result from the Commission's "true-up" requirements. Under the new, alternative price cap rule, a cable operator's annual rate adjustment is deemed reasonable if it is based on reasonable and demonstrable cost projections. The fact that actual costs ultimately are less than those projections does not render the rate adjustment unreasonable. Instead, it simply reduces the maximum rate that will be deemed "reasonable" during the next year. If the operator errs in "truing up" its rates, refunds for any resulting overcharge will accrue for one year from the time that it implements a rate adjustment based on that "true-up" — not from the previous year's increase. Thus, subscribers remain fully protected, and no revisions to the one-year limit on refunds are required.

V. The Commission Should Not Eliminate the One-Year Limit on a Franchising Authority's Right to Review a Rate Filing and Issue an Order.

NATOA contends that the Commission should eliminate the one year limit by which a franchising authority must issue an order because "many franchising authorities are still waiting for the Commission to rule on cable operators' appeals. . . ."[20] However, to the extent the Commission upholds a local rate order, the franchising authority would be permitted to make subscribers whole. Similarly, to the extent the Commission reverses the local order, the operator should be made whole.[21] To the extent necessary, operators could issue refunds and/or adjust rates prospectively to compensate subscribers or recoup improper

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20/ *Id.* at 14.

21/ *See Thirteenth Recon. Order* at ¶ 98 (permitting operators to recover any lost revenues after the Commission reverses a local rate order).

undercharges.[22] Previous rate forms would be amended accordingly to generate proper rates (and, if necessary refunds) going-forward.[23]

VI. The Commission's Procedural Regulations Regarding The Period By Which Franchising Authorities Must Review an Operator's Rate Filing Are Adequate.

NATOA requests in its Petition that the Commission require operators to provide certain supporting information for certain unspecified "key calculations" in the Form 1240. Because the Form allegedly does not require such information, it asks the Commission to clarify that certain attachments should be required, consistent with the Commission's *Third Order on Reconsideration*.[24]

However, Form 1240 does require such information to the extent the Commission has deemed necessary. Moreover, the form includes several worksheets which require operators to itemize certain figures and calculations. This information will be sufficient to permit the franchising authority to review the filing.

22/ The Commission has stayed local rate orders pending resolution under the same rationale — subscribers and operators can always be compensated appropriately by offsetting adjustments to rates or refunds. *See Petitions for Stay of Action Pending Resolution of Applications for Review or Petitions for Reconsideration*, DA 95-1382 (rel. Jun. 23, 1995) (staying five Bureau rate orders pending review or reconsideration); *Petitions for Stay of Action Pending Resolution of Applications for Review or Petitions for Reconsideration*, DA 95-1235 (rel. Jun. 15, 1995) (staying various Bureau rate orders pending review or reconsideration); *Comcast Cablevision of New Haven, Inc., et al.*, DA 95-469 (rel. Mar. 13, 1995) (staying local rate order pending appeal).

23/ NATOA assumes that the franchising authority decision on subsequent rate adjustments pending appeal could not be adjusted prospectively to reflect the Commission's rate order. But such a requirement is necessary to protect the rights of all parties.

24/ *Third Order on Reconsideration*, 9 FCC Rcd 4316 (1994).

NATOA also suggests that amendments to filings with "substantial changes" warrant increasing the franchising authority review deadline by 90 days. Such a provision is unnecessary because the rule protects the rights of franchising authorities. Cable operators may not adjust rates earlier than 30 days after an amendment is filed reflecting a material change in the operator's initial rate filing. This should provide the franchising authority with sufficient time to review the amendment. NATOA, without any support at all states that "[b]ased on past experience," such amendments are so substantial that the franchising authority's review of the original information becomes more or less meaningless.[25] However, because the cable operator must file a *complete* Form 1240 before the franchising authority review period commences, the amendments can only be adjustments to information already provided at the time a complete Form 1240 was filed. Thus, the Commission's current procedural rules are sufficient to protect franchising authorities' rights.

VII. The Commission Properly Determined that Franchising Authorities Should Refund Franchise Fees Plus Interest at the Rate of 11.25%.

NATOA claims that franchising authorities should be liable only for IRS interest on franchise fee refunds, rather than the 11.25% rate, arguing that "there is no equitable reason" to require local authorities to pay 11.25% on refunds when cable operators pay the (presumably lower) IRS rate. But the Commission's policy is sound and has a reasonable basis. The Commission has "already determined that 11.25% is presumptively the cable operator's cost of capital."[26] Operators therefore should be permitted to recover the actual

25/ NATOA Petition at 17.

26/ *Thirteenth Recon. Order* at ¶ 152.

franchise fees paid to the franchising authority plus the presumptive cost to the operator of obtaining such capital for operating purposes.[27] The same rationale does not apply to subscriber refunds. Operators pay the IRS rate because that is the rate which reflects the time value of money to cable subscribers.

NATOA is mistaken when it states that operators can earn a "profit" on overcharges to subscribers in the amount of the difference between 11.25% and the presumably lower IRS rate. Operators that overpay franchise fees only recover the overpayment plus the cost of capital. The Commission's current rules simply put such operators in the position they would have been in had they not overcharged subscribers.

VIII. The Commission's Rule Requiring Cable Operators to Notify Franchising Authorities of the Form 1240 Filing Date is Reasonable.

The series of concerns that NATOA raises regarding the selection of an annual filing date similarly do not warrant any change in the rules. NATOA provides no valid rationale why cable operators should be required to provide 45 days notice of their annual filing date.[28] The Commission's rules already provide franchising authorities with discretion to reject an operator's choice of a filing date for good cause shown.[29] And because the franchising authority effectively has a 60-day window in which to select a new filing date, NATOA's concern that a franchising authority's ability to reject a filing date will be limited is groundless.

27/ Moreover, operators must offset any overcharges (and adjust any undercharges) by the 11.25% when they true-up rates prospectively.

28/ NATOA Petition at 20-21.

29/ 47 C.F.R. § 76.922(e)(1).

Similarly, NATOA's concern that whether "good cause" is shown will result in "needless disputes" also is unfounded. The Commission's rules set a default filing date within *two months* after the date chosen by the operator. So, even if the parties cannot reach an amicable resolution of a filing date, the franchising authority is given the benefit of the doubt, and the operator's filing date is further delayed by 60 days. If anything, the rule would best be amended to *reduce* the 60-day period.[30]

It is assumed that all parties will work in good faith to select a date which is amenable to both the operator and the franchising authority. But there is no reason to provide the franchising authority with the unilateral right to reject the date. The purpose of the "good cause" rule is to prevent franchising authorities from routinely, without justification, delaying their review of a proposed rate adjustment. As the Commission has stated before, a franchising authority that certifies to regulate basic rates has affirmed that it has the resources and authority to comply with the Commission's rate regulations.[31] To delay the review of rate filings and the implementation of rate adjustments is plainly unfair to cable operators that incur operating costs which they are entitled to recover and is unfair to subscribers who may have to wait to receive new programming services while a franchising authority delays the review process.[32] The elimination of the good cause rule would be an invitation to delay an operator's recoupment of costs which it is entitled to recover.

30/ NATOA Petition. at 21.

31/ *See* 47 C.F.R. § 76.910(b).

32/ *Thirteenth Recon. Order* at ¶¶ 6, 56-57, 70. Moreover, NATOA does not dispute that operators have the right to recover the costs of providing cable service, including external cost increases, inflation and costs associated with channel changes.

IX. A Franchising Authority Should Issue an Accounting Order at the End of the 60-Day Review Period for Form 1205 Filings by Quarterly-Adjustment Operators.

NATOA argues for a revision of the existing rules that govern quarterly Form 1205 filings, which would eliminate the requirement that a franchising authority issue an accounting order after 60 days to reserve its right to issue refunds for equipment rate overcharges. Its rationale -- that the rule may be impractical and "confusing" for certain local regulators, and would force franchising authorities "to sort through historical rate data to determine which rule subsection [(h)(1) or (h)(2)] would apply"[33/] — simply does not state a case. Moreover, the rule is necessary.

The rule is essential for those cable operators that elect to file Form 1210 on a quarterly basis and thus could conceivably file the form each quarter. Because an operator must provide 30 days notice prior to a rate increase, and because a franchising authority has 60 days to review the notification, an operator may not be able to implement a rate adjustment for a full 90 days into a quarter, or only 30 days prior to the beginning of the *next quarter* in which the operator may plan a rate filing. But if the Commission adopted the annual adjustment procedures for *quarterly-filing* operators, the regulatory lag would be even greater. Under the annual filing procedures, franchising authorities reviewing quarterly adjustment filings would have 90 days to review filings. Coupled with the 30 day notice period for rate adjustments, operators could be adjusting rates on the date a new quarter commences, clearly an impractical result.

33/ NATOA Petition at 22-23.

Contrary to NATOA's claim, franchising authorities are clearly not "forced" to "sort" through historical rate data to determine which rule applies. The franchising authority need only look to the most recent rate filing to determine whether a quarterly or annual filing was submitted. The regulator could, of course, also inquire of the operator or review recent rate resolutions approving or denying rate adjustments, rather than "sort" through rate filings submitted by the operator. Either way, NATOA's reasoning does not support such a material change in the obligations of franchising authorities to issue an accounting order. NATOA's argument that a city council may be out of session and unable to adopt accounting orders is simply not convincing given the ample number of days provided under the rules to issue an accounting order.

X. The Commission's Modification of its Policy to Put "In Play" only a Rate Increase Itself Rather Than the Entire Rate is Correct and is Consistent with the 1992 Cable Act.[34]

In the *Thirteenth Recon. Order* the Commission modified its policy so that the only component of a total rate that is "in play" following a complaint concerning a rate increase is the increase itself, and not the previously existing rate. Previously, the Commission indicated that it could not only rescind the increase but also prescribe a rate lower than the existing rate, even if no complaint had been filed against the previously existing rate within the time period authorized by the rules. The reasoning that supports this change in policy is both sound and consistent with the provisions of the 1992 Cable Act.

34/ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (the "1992 Cable Act").

The Commission recognized that its previous policy created an "uncertain business environment for cable operators that have not had their CPSTs subject to rate regulation," and could "generally discourage investment, without which operators may lack the resources to upgrade their networks, add new programming, services, and provide new innovative services."[35]

Notwithstanding the Commission's reasoning, GMA argues that the Commission should reverse its position because operators whose initial rates were adjusted to what subscribers or franchising authorities deemed "reasonable" levels, but whose rates were not complained about under the old regime, could retain rates at levels higher than the new rules would permit. GMA acknowledges that this may be possible only where operators did not subsequently adjust rates after the second round of rate regulation because the complaint process could not be triggered, but nevertheless requests that the Commission "continue to review cable operators' entire rate when it receives a Form 329 complaint." Alternatively, GMA requests that the Commission afford parties the right to file complaints regarding new initial CPS rates.[36]

GMA offers no convincing rationale as to why the Commission should continue to consider all rates "in play" and review an operator's entire rate when it receives a Form 329 complaint. Pursuant to the 1992 Cable Act, if no complaint was filed on the operator's initial rate by February 28, 1994, then interested parties lost the opportunity to dispute rates until another rate adjustment was made. This bar is absolute and statutory, and complaints

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35/ *Thirteenth Recon. Order* at ¶ 163.

36/ GMA Petition at 3.

may not be filed on initial rates after 180 days from the effective date of the Commission's rate regulations:

> Except during the 180-day period following the effective date of the regulations prescribed by the Commission. . . the [complaint] procedures established [by the Commission] shall be available only with respect to complaints filed within a reasonable period of time following a change in rates that is initiated after that effective date. . . .[37]

Although the Commission amended its rules effective May 15, 1994, the initial regulations adopted pursuant to the 1992 Cable Act were effective September 1, 1993, and the statutory period for complaints ended February 28, 1994. Under GMA's rationale, and notwithstanding this statutory bar, parties would be able to file rate complaints even if the Commission amended its rate regulations and revised its benchmark standard twelve months, eighteen months, or even two years later. Quite clearly, Congress intended to bring some finality to the complaint process by setting the 180 day limitation, and permitting a complaint to be filed as requested by GMA would be contrary to the clear import of the statute.

But, even if the Commission had the authority to modify its rates "in play" policy, and notwithstanding its determination that such a reversal would result in instability and uncertainty, GMA's concerns are, as a practical matter, moot. Assuming that some cable operators maintained their rates and did not reduce their rates by any additional amount that may have been required by the Commission's rules, the amount of inflation alone that an operator could have taken to date is over five percent.[38] Therefore, because the operator's

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37/ 47 U.S.C. § 543(c)(3).

38/ Operators were entitled to take at least a 2.15% adjustment for the period September 30, 1993 until June 30, 1994 and a further 2.96% adjustment for the period June 30, 1994 to (continued...)